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Alvis in Wonderland - Assumption of Risk No Longer a Complete Bar in Strict Liability Actions?

The Honorable Myron T. Gomberg

ALVIS IN WONDERLAND—ASSUMPTION OF RISK NO LONGER A COMPLETE BAR IN STRICT LIABILITY ACTIONS?

*The Honorable Myron T. Gomberg**

> *We therefore hold that in cases involving negligence the common law doctrine of contributory negligence is no longer the law in the State of Illinois, and in those instances where applicable it is replaced by the doctrine of comparative negligence.*[1]

This judicial adoption of pure comparative negligence in *Alvis v. Ribar* heralded a monumental change in the course of Illinois tort law.[2] By holding that comparative negligence will be employed "where applicable," the Illinois Supreme Court invited further inquiry into the doctrine's parameters.

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1. Alvis v. Ribar, 85 Ill. 2d 1, 25, 421 N.E.2d 886, 896-97 (1981); *see also infra* notes 92-99 and accompanying text.

As this article goes to press, the Illinois Supreme Court has rendered its decision in Coney v. J.L.G. Indus., No. 56306 (Ill. Sup. Ct. May 18, 1983). *See infra* note 8. In an opinion written by Justice Moran, the author of the *Alvis* opinion, the court expressly held that the comparative fault principles adopted in the *Alvis* decision will be applied in strict product liability cases, *Coney*, No. 56306, at 8 (Ill. Sup. Ct. May, 18, 1983), that misuse of the product and assumption of risk are no longer complete bars to recovery in such cases, *id.* at 9, and that comparative fault does not alter the concept of joint and several liability among codefendants, *id.* at 13.

In analyzing the propriety of applying comparative principles in the area of strict products liability, the *Coney* court quoted Professor Schwartz, *see infra* note 108, to indicate that juries have long been comfortable with comparing the defendant's strict liability with the user's contributory negligence. Thus, the court found no support for the "apples and oranges" argument against the application of comparative fault to products liability cases. *See Coney*, No. 56306, at 7 (Ill. Sup. Ct. May 18, 1983).

Although the court was not asked directly to rule on the issue of the survival of the assumption of risk defense after the adoption of comparative fault, it disposed of the question as an ancillary aspect of the products liability issue. The court analyzed the history of the assumption of risk defense in Illinois and stated as follows:

> [T]his court, in *Williams v. Brown Manufacturing Co.*, adopted misuse and assumption of risk as complete defenses to a strict products liability action. But, at the same time, it was said there that "[c]ontributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence." We adhere to this statement. We believe that a consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect should not be compared as a damage reducing factor.

Id. at 9 (citations omitted).

In expressly holding that misuse and assumption of risk will no longer be complete bars to recovery in a strict products liability case, the *Coney* court stated:

> [S]uch misconduct will be compared in the apportionment of damages. Specifical-

Ancillary questions suggested by *Alvis* await resolution on a case-by-case basis.[3] Specific questions arising from the *Alvis* court's adoption of comparative negligence include: whether the concepts of joint and several liability will be changed?;[4] whether the abolition of contributory negligence will affect Illinois' statutory torts?;[5] whether comparative negligence will alter ac-

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ly, we hold: Once defendant's liability is established, and where both the defective product and plaintiff's misconduct contribute to cause the damages, the comparative fault principle will operate to reduce plaintiff's recovery by that amount which the trier of fact finds him at fault.

Id. The *Coney* decision appears to answer several of the most pressing questions left open by the *Alvis* decision. For further discussion of the import of the *Coney* case, see Chi. Daily L. Bull., May 18, 1983, at 1, col. 2; Duncan, Coney v. JLG Industries, Inc.: *A Brief Case Synopsis,* 18 ILL. ST. B.A. TORT TRENDS No. 5 (1983). Although the Illinois Supreme Court in *Coney* decided that assumption of risk will no longer be a complete bar to recovery in strict products liability cases, the more extensive analysis provided by this article may prove beneficial in jurisdictions where the question awaits resolution.

2. For over one hundred years prior to *Alvis,* Illinois followed the doctrine of contributory negligence. The contributory negligence doctrine was adopted in Aurora Branch R.R. v. Grimes, 13 Ill. 585 (1852). *Aurora* established the rule that the plaintiff must demonstrate his own lack of negligence in order to recover in a negligence action. The *Aurora* court stated:

> Where a party seeks to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury, and the burden of proof is upon the plaintiff, to show not only negligence on the part of the defendant, but also that he exercised proper care and circumspection; or, in other words, that he was not guilty of negligence.

Id. at 587.

3. *Alvis,* 85 Ill. 2d at 28, 421 N.E.2d at 898.

4. According to the rule of joint and several liability, if the plaintiff has a cause of action against two or more defendants and each defendant is liable, then the plaintiff is theoretically permitted to press for full recovery from each defendant separately. *See* Frank Parmelee Co. v. Wheelock, 224 Ill. 194, 200, 79 N.E. 652, 654 (1906). By adopting a comparative negligence system which attempts to apportion financial responsibility in relation to fault, the potential for double recovery by plaintiff would no longer exist. A problem arises, however, when an insolvent codefendant is involved. *See* N. Appel, The Effect of Comparative Negligence on Illinois Procedural and Substantive Law Rules Including Joint and Several Liability, Strict Liability and Assumption of Risk 2-2 to 2-5 (June 11-12, 1981) (Illinois Institute for Continuing Legal Education seminar: Illinois' New "Pure" Comparative Negligence: Law and Practice) [hereinafter cited as Appel, Effect of Comparative Negligence]; *Comparative Negligence,* 16 ILL. ST. B.A. TORT TRENDS No. 4 (D. Mueller ed. 1981) [hereinafter cited as *Comparative Negligence*].

5. Illinois has three principal statutory provisions for tort actions. First, the Liquor Control (Dram Shop) Act, ILL. REV. STAT. ch. 43, §§ 94-195 (1981), provides that "[e]very person who is injured in person . . . by any intoxicated person, has a right of action . . . against any person who by selling or giving alcoholic liquor, causes the intoxication of such person." *Id.* § 135. Because the Dram Shop Act is a statutory, and not a common law, negligence action, the intoxicated person's conduct does not constitute contributory negligence nor preclude the plaintiff's recovery. *See* Nelson v. Araiza, 69 Ill. 2d 534, 539, 372 N.E.2d 637, 639 (1977); Merritt v. Chonowski, 58 Ill. App. 3d 192, 194, 373 N.E.2d 1060, 1061 (3d Dist. 1978).

Second, the Structual Work Act, ILL. REV. STAT. ch. 48, §§ 60-69 (1981), provides that

> all scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any . . . building . . . or other structure, shall be erected and constructed, in a safe, suitable and

tions based upon intentional torts[6] or willful and wanton misconduct?;[7] and finally, because comparative negligence seems to apply only in "cases involving negligence,"[8] whether comparative principles will be precluded in

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proper manner, and . . . placed and operated [so] as to give proper and adequate protection to the life and limb of any person . . . employed . . . thereon, or passing under or by [the above structures]. . . .

Id. § 60. Any injury to person or property which results from the willful violation of, or noncompliance with, these safety standards gives rise to a civil right of action. *Id.* § 69. The common law defense of contributory negligence does not bar recovery in an action under the Structural Work Act. *See* Bryntesen v. Carroll Constr. Co., 27 Ill. 2d 566, 568, 190 N.E.2d 315, 317 (1963); Gundich v. Emerson-Comstock Co., 21 Ill. 2d 117, 130, 171 N.E.2d 60, 67 (1960).

Finally, the Wrongful Death Act, ILL. REV. STAT. ch. 70 §§ 1-2.2 (1981), provides a cause of action for the personal representatives of any person whose death was caused by a wrongful or negligent act if the person injured would have been entitled to an action for damages had death not occurred. *Id.* §§ 1-2. The contributory negligence of any beneficiary is not an affirmative defense but, rather, limits the recovery of the contributorily negligent person. *Id.* § 2.

Whether the *Alvis* court's adoption of comparative negligence will alter these statutory torts remains to be seen. *See* Guy, *There is Nothing to Compare in Comparative Negligence,* 70 ILL. B.J. 484, 486 (1982) [hereinafter cited as Guy]; Kionka, *Comparative Negligence Comes to Illinois,* 70 ILL. B.J. 16, 20 (1981) [hereinafter cited as Kionka]; *see also* Chi. Daily L. Bull., Sept. 2, 1981, at 1, col. 3 (discussing attorney's opinions regarding the effect of *Alvis* on Illinois statutory torts); *The New Comparative Negligence Law,* 26 ILL ST. B.A. TRIAL BRIEFS 3 (special issue May, 1981) (comparative negligence may affect Dram Shop Act, Structural Work Act, Highways and Bridges Act, and other statutory provisions) [hereinafter cited as *The New Comparative Negligence Law*].

6. Intentional torts such as assault and battery, and libel and slander, require a showing of the wrongdoer's intent or actual malice. Consequently, a defendant may be subject to greater liability for intentional torts than for negligent conduct. *See* Album Graphics, Inc. v. Beatrice Foods Co., 87 Ill. App. 3d 338, 350, 408 N.E.2d 1041, 1050 (1st Dist. 1980). For a general discussion of potential changes in tort law after the adoption of comparative negligence, see Guy, *supra* note 5, at 486; Kionka, *supra* note 5, at 20; Appel, Effect of Comparative Negligence, *supra* note 4, at 2-10 to 2-11.

7. Traditionally, contributory negligence was not a defense to a claim for injury caused by willful and wanton misconduct. *See* Heidenreich v. Bremner, 260 Ill. 439, 452, 103 N.E. 275, 280 (1913). Comparative negligence will not change that rule because the Illinois Supreme Court has held that willful and wanton misconduct is different from negligence in kind rather than merely in degree. *See* O'Brien v. Township High School Dist. 214, 83 Ill. 2d 462, 468-70, 415 N.E.2d 1015, 1018-19 (1980). Thus, the same factual averments may sustain causes of action based both on negligence and on willful and wanton misconduct. *Id.* For commentary on the applicability of comparative fault principles to allegations of willful and wanton misconduct, see Guy, *supra* note 5, at 486; Kionka, *supra* note 5, at 19-20; Appel, Effect of Comparative Negligence, *supra* note 4, at 2-10 to 2-11; *Comparative Negligence, supra* note 4, at 4.

8. Recovery based on strict products liability was adopted in Illinois in Suvada v. White Motor Co., 32 Ill. 2d 612, 622, 210 N.E.2d 182, 188 (1965). Contributory negligence is not a bar to recovery in strict liability. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 426-27, 261 N.E.2d 305, 310 (1970); *see also infra* notes 32-41 and accompanying text. It is probable that comparative principles will be applied to strict liability actions. *See* Guy, *supra* note 5, at 485; Kionka, *supra* note 5, at 19; Appel, Effect of Comparative Negligence, *supra* note 4, at 2-6 to 2-8; *Comparative Negligence, supra* note 4, at 3-4; *see also* Chi. Daily L. Bull., Sept. 2, 1981, at 1, col. 3 (quoting the dissent in *Alvis* which warned against the adverse effects of comparative negligence doctrine on strict liability); *The New Comparative Negligence Law, supra* note 5 (it is likely that comparative negligence principles will be applied to strict liability claims).

strict products liability actions?[9]

Analysis of these many unresolved issues[10] is beyond the scope of this article. Consequently, this article will focus on one narrow question left unresolved by the *Alvis* decision: whether the affirmative defense of assumption of risk will continue to be an absolute bar to recovery in strict tort liability actions?[11] Initial examination of assumption of risk generally,[12] and its development in the Illinois courts in particular,[13] reveals that the affirmative defense posits a cardinal unfairness to the plaintiff now that the doctrine of comparative negligence is recognized in Illinois.[14]

The California judiciary's treatment of assumption of risk as a form of plaintiff misconduct, rather than as a complete bar to recovery, indicates a burgeoning trend by the courts to apply comparative fault principles to both contributory negligence and assumption of risk doctrines.[15] Additionally, two recent Illinois cases, *Skinner v. Reed-Prentice Division Package Machinery Co.*[16] and *Alvis v. Ribar,*[17] illustrate judicial awareness of, and

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But cf. Note, *Pure Comparative Negligence in Illinois,* 58 CHI.[-]KENT L. REV. 599, 621-28 (1982) (comparative negligence would compromise the policy goals of strict liability which include the economic motivation of manufacturers to design and market defect-free products) [hereinafter cited as Note, *Pure Comparative Negligence*]. *See generally* Brewster, *Comparative Negligence in Strict Liability Cases,* 42 J. AIR L. & COM. 107 (1976) (equating liability with fault requires the application of comparative negligence in strict liability actions); Robinson, *Square Pegs (Products Liability) in Round Holes (Comparative Negligence),* 52 CAL. ST. B.J. 16 (1977) (discussing alternative comparative negligence concepts as applied to product liability actions in view of Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)).

9. *Alvis,* 85 Ill. 2d at 25, 421 N.E.2d at 896-97.

10. For a survey of these issues and others, as well as speculation regarding their resolution, see generally Guy, *supra* note 5 (predicting that the adoption of comparative negligence in Illinois will eliminate joint liability); Appel, Effect of Comparative Negligence, *supra* note 4 (discussing whether joint and several liability is consistent with comparative negligence, and considering post-*Alvis* effect of insolvency of one or more tortfeasors in action against multiple tortfeasors); *Comparative Negligence, supra* note 4 (questioning, *inter alia,* whether a cause of action for willful and wanton misconduct remains after *Alvis,* and whether a verdict amount and percentage distribution in an action against some parties would control total damages recoverable in a later action against other parties). For a general discussion of the significance of *Alvis,* see also Ashman, *Torts—Comparative Negligence,* 67 A.B.A. J. 921 (1981) (summary of *Alvis v. Ribar,* highlighting the court's rationale that the concept of comparative negligence produces a more just distribution of loss); Note, *Pure Comparative Negligence, supra* note 8, at 599 (discussing issues left unresolved by *Alvis*); *Comparative Negligence—Illinois Judiciary Adopts the "Pure" Form,* 25 TRIAL LAW. GUIDE 284 (J. Kennelly ed. 1981) (discussing the adoption of comparative negligence in Illinois).

11. In Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 430, 261 N.E.2d 305, 312 (1970), the pre-*Alvis* court held that assumption of risk was a complete bar to recovery in a strict products liability action. *See also infra* notes 32-41 and accompanying text.

12. *See infra* notes 19-30 and accompanying text.

13. *See infra* notes 32-51 and accompanying text.

14. *See infra* notes 52-56 and accompanying text.

15. *See infra* notes 61-83 and accompanying text.

16. 70 Ill. 2d 1, 12, 374 N.E.2d 437, 442 (1978). For an analysis of *Skinner,* see *infra* notes 86-91 and accompanying text.

17. 85 Ill. 2d 1, 421 N.E.2d 886 (1981). For an analysis of *Alvis* and the doctrine of assumption of risk, see *infra* notes 95-99 and accompanying text.

sympathy for, the injustice created by a complete bar to recovery. Thus, there is both direct and indirect support for the conclusion that assumption of risk should no longer bar recovery in an Illinois strict tort liability action.[18]

THE ASSUMPTION OF RISK DEFENSE IN STRICT TORT LIABILITY ACTIONS

Any analysis of the assumption of risk doctrine must begin with the prestigious Restatement (Second) of Torts's definition of the defense in strict liability actions:[19]

> Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases . . . applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in *voluntarily and unreasonably proceeding to encounter a known danger,* and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.[20]

Consequently, a plaintiff who merely inadvertently overlooked a product defect can still recover damages caused by the defect. A plaintiff will be

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18. *See infra* notes 100-07 and accompanying text.

19. A detailed history of the assumption of risk doctrine in the context of a strict tort liability action, and particularly its metamorphosis in the Restatement of Torts, is beyond the purview of this article. For such an historical perspective, see Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Area,* 60 IOWA L. REV. 1, 4-10 (1974) [hereinafter cited as Twerski, *Old Wine in a New Flask*]. *See also* Note, *Assumption of Risk and Strict Products Liability,* 95 HARV. L. REV. 872, 873-75 (1982) (although plaintiff's recovery was barred under the traditional concept of assumption of risk, recent decisions have limited the circumstances in which the plaintiff's assumption of risk completely bars recovery in strict liability actions) [hereinafter cited as Note, *Assumption of Risk*].

20. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965) (emphasis added). The Reporter's use of the term "contributory negligence," of the type which consists in "voluntarily and unreasonably proceeding to encounter a known danger," is more commonly referred to as "assumption of risk." Section 402A delineates the elements of a strict liability action as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. § 402A. Furthermore, the Restatement evaluates assumption of risk arising from negligent or reckless conduct. *Id.* §§ 496A-496G. It also discusses a plaintiff's consent to accept the harm arising from the defendant's intentional conduct. *Id.* § 892.

precluded from recovery, however, if he assumed the risk of injury by discovering that the product was defective and unreasonably exposed himself to the known hazard. The Restatement's characterization of assumption of risk in strict liability actions as a "form" of contributory negligence[21] has been criticized as blurring the distinction between contributory negligence and assumption of risk.[22] It would seem more appropriate to state that contributory negligence and assumption of risk simply are different degrees of plaintiff misconduct to be considered when determining liability.

Under the Restatement definition, whether the plaintiff's conduct will be classified as assumption of risk by the fact finder depends upon the resolution of one question: How voluntary and reasonable were the plaintiff's actions in light of his knowledge of the product? According to the Restatement, if the plaintiff's conduct meets a threshold level of voluntary and unreasonable action, he will have assumed the risk of his injury. It is often difficult, however, to ascertain whether, and to what extent, the plaintiff made a conscious choice to perform some act relative to the defective product. For example, in an effort to prevent a machine from jamming, an experienced factory worker may make a split-second decision to place his hand into the machine subsequent to the moment of known danger during operation.[23] Should such a split-second "decision" be considered voluntary and unreasonable if the operator believed the expensive machinery would be damaged if he allowed the jamming to occur? Under the Restatement's definition of assumption of risk, the fact finder must delve into the plaintiff's subjective state of mind to determine whether he assumed the risk of injury.[24] Conversely, the plaintiff's contributory negligence is determined by reference to an objective standard—that of the "reasonable man." Because the facts are often insufficient to indicate the plaintiff's actual "knowledge, understanding and appreciation of the danger,"[25] it is virtually impossible to make this determination in a fair and accurate manner.

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21. *Id.* § 402A comment n.

22. *See, e.g.*, Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 176 (1974) ("The *Restatement* [Second's] position . . . has been a rule in search of a rationale"); Twerski, *Old Wine in a New Flask, supra* note 19, at 3 ("The second *Restatement*['s] . . . language is vague, inexact and somewhat delphic."); Note, *Assumption of Risk, supra* note 19, at 874 ("The *Restatement* . . . is too ambiguous to provide guidance in the proper use of the assumption of risk defense"); Note, *Assumption of the Risk as the Only Affirmative Defense Available in Strict Products Liability Actions in Oregon: Baccelleri v. Hyster Co.*, 17 WILLAMETTE L.J. 495, 500 (1981) (because contributory negligence and assumption of risk are frequently difficult to distinguish, behavior may often be characterized by either designation).

23. *See* Bartkewich v. Billinger, 432 Pa. 351, 355, 247 A.2d 603, 605 (1968) (recovery barred because plaintiff "did exactly what obviously was dangerous—reached into an operating . . . machine"); *see also* Twerski, *Old Wine in a New Flask, supra* note 19, at 32-34 (author disagrees with *Bartkewich* on grounds that the plaintiff's action was not voluntary and unreasonable).

24. *See supra* text accompanying note 20.

25. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 430, 261 N.E.2d 305, 312 (1970).

A recent unreported case in the Circuit Court of Cook County, Illinois, *Schwass v. Uniloy Division-Hoover Ball & Bearing Co.*,[26] illustrates the unnecessary difficulties which the finder of fact must confront when evaluating the plaintiff's decision-making process. The plaintiff in *Schwass* reached into a machine to remove a lodged glass bottle while the machine was running.[27] He apparently had been instructed as to the machine's operation and warned not to place his hands into the dangerous area of the machine.[28] The plaintiff knew he had a maximum of three seconds to reach his hand in and out of the machine without being injured.[29] The question arose whether this plaintiff's instantaneous action, based upon his subjective decision-making judgment, could be characterized as voluntary or unreasonable under the Restatement. Alternatively, could this action be viewed objectively, as a matter of law, as a reflex action by a Chaplinesque factory worker who, as in *Modern Times,* attended a machine that was engaged in a seemingly unending mechanical process, the continuum of which was broken only momentarily by a stuck glass bottle? This case exemplifies the basic unfairness to the plaintiff in requiring the fact finder to determine his subjective state of mind by applying vague standards of voluntariness and reasonableness.[30] The logical question to be asked is whether the ends of justice are served by barring a plaintiff's recovery based on the dubious requirements of the Restatement.

Assumption of Risk in Strict Tort Liability Actions in Illinois

Despite its imprecision, the Restatement's definition of assumption of risk has been instrumental in forming the contours of the doctrine in strict tort liability cases.[31] For example, the Restatement inspired the leading Illinois case on assumption of risk, *Williams v. Brown Manufacturing Co.*[32] The plaintiff in *Williams* was operating a trenching machine while standing between the handlebars at the back of the machine. A portion of the trencher

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26. No. 79-L-27454 (Cir. Ct. of Cook County, Ill., June 28, 1982) (order denying motion for summary judgment).

27. *Id.* at 6.

28. *Id.*

29. *Id.* The defendant in *Schwass* moved for summary judgment, contending that the plaintiff had assumed the risk of injury. Summary judgment was denied and the circuit court ruled that the assumption of risk was not a bar to recovery in a strict products liability action because of the adoption of comparative negligence. *Id.* at 1.

30. The subjective-objective dichotomy is discussed in Comment, *The Knowledge Element of Assumption of Risk as a Defense to Strict Products Liability,* 10 J. Mar. J. Prac. & Proc. 243 (1977).

31. *See, e.g.,* Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972) (New Mexico Supreme Court adopted the Restatement view of strict liability and applied it to retailers, manufacturers, and suppliers); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974) (Oklahoma Supreme Court adopted the Restatement definition of "unreasonably dangerous" in the context of strict product liability); Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975) (Vermont Supreme Court adopted the Restatement view of strict product liability).

32. 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

became caught on an underground pipe. After slipping off the pipe, the machine lurched backward and severely injured the plaintiff.[33] The plaintiff contended that the machine was defective because it lacked a safety device to prevent such an accident. The plaintiff further alleged that the drive-belt mechanism was not constructed properly and that the machine lacked a warning label regarding the danger of operating the machine from behind and between the handlebars.[34] The plaintiff claimed that the instruction manual accompanying the trencher did not refer to the proper position for the operator; rather, the manual dealt only with the functioning of the machine's drive-belts. Because the plaintiff acknowledged that he had read the manual, at least in part, prior to his injury,[35] the defendant contended that the plaintiff had assumed the risk of his injury.[36]

The Illinois Supreme Court quoted the Restatement's definition of assumption of risk in strict liability actions.[37] Apparently in an effort to define the plaintiff's conduct within that framework, the court noted that a "greater degree of culpability" is required to bar a plaintiff's recovery in a tort action that is not based upon negligence than in one that *is* based on negligence.[38] The court held that contributory negligence would not bar recovery in a strict product liability action in Illinois,[39] but indicated that the assumption of risk defense would continue to preclude recovery.[40] The court clearly adopted the Restatement's subjective standards and stated that it is within the jury's province to apply these standards to determine the plaintiff's "knowledge, understanding and appreciation of the danger" of the product.[41] Thus, after *Williams,* contributory negligence was a complete bar to the plaintiff's

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33. *Id.* at 421-22, 261 N.E.2d at 307.

34. *Id.* at 422, 261 N.E.2d at 307.

35. *Id.* at 423, 261 N.E.2d at 307-08.

36. *Id.* at 421, 261 N.E.2d at 307. The defendant also contended that the action was barred by the statute of limitations. *Id.* at 431, 261 N.E.2d at 312. The court rejected this claim, holding that the plaintiff's burden of proof provided adequate safeguards against injustice. *Id.* at 432, 261 N.E.2d at 313.

37. *Id.* at 423, 261 N.E.2d at 308 (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965)). For the Restatement's definition, see *supra* text accompanying note 20.

38. The court stated:

> [A] *greater degree of culpability* on the part of a plaintiff will be required in order to bar recovery in some types of action [*sic*] than in others. Thus, his simple contributory negligence (*i.e.*, lack of due care for one's own safety as measured by the *objective* reasonable-man standard) will bar recovery by a plaintiff in a tort action for negligence . . . but as to other types of actions a greater degree of culpability on plaintiff's part may be necessary in order to preclude recovery and simple contributory negligence will not suffice.
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> *Williams,* 45 Ill. 2d at 425, 261 N.E.2d at 309 (emphasis added). The court then shifted to a qualitative analysis and examined whether "recovery will be barred only when the *nature* of plaintiff's misconduct has reached the point at which he has misused the product or has assumed the risk of its use."

Id. at 426, 261 N.E.2d at 310 (emphasis added).

39. *Id.* at 427, 261 N.E.2d at 310.

40. *Id.* at 430, 261 N.E.2d at 312.

41. *Id.*

recovery in a negligence action, but did not bar recovery in a strict product liability case. In both types of action, assumption of risk continued to bar plaintiff's recovery.

For over a decade, the *Williams* decision has been the cornerstone of the Illinois courts' position on the assumption of risk defense.[42] Some cases subsequent to *Williams* have emphasized the requirement that the plaintiff's subjective knowledge of the product's dangerous propensities be ascertained.[43] Others have focused on the requirement that the plaintiff's conduct be voluntary.[44] For example, in *Collins v. Musgrave,*[45] the defendant Musgrave, the proprietor of a small service station, sold the plaintiff a defective axle assembly unit which had been manufactured by the Ford Motor Company.[46] The unit was installed in the plaintiff's Ford truck. Later, when the plaintiff was driving on the highway near Musgrave's service station, the brakes in the newly installed unit failed. Instead of stopping on the shoulder of the roadway, the plaintiff coasted into Musgrave's station and struck a brick wall.[47] There was no evidence that the plaintiff could have discovered the defect before the accident occurred. Even if there was such evidence, failure to discover a product defect only constitutes contributory negligence and does not bar recovery in a strict products liability action.[48] Consequently, neither Ford nor Musgrave raised this issue. Instead, the defendants relied on the assumption of risk defense and alleged that the plaintiff had "unreasonably proceed[ed] to encounter a known danger"[49] by continuing into the service station rather than immediately stopping at the roadside.[50] Due to the insufficiency of evidence regarding the plaintiff's knowledge of the assembly defect, the *Collins* court held that his split-second decision to turn into Musgrave's

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42. As one commentator has stated, "[t]he classical form of assumption of risk relieves a defendant of liability for accident losses when the plaintiff knew and appreciated the risk of injury posed by the defendant, but nevertheless voluntarily proceeded to encounter the risk of harm." Note, *Assumption of Risk, supra* note 19, at 873-74.

43. *See, e.g.,* Doran v. Pullman Standard Car Mfg. Co., 45 Ill. App. 3d 981, 991, 360 N.E.2d 440, 447-48 (1st Dist. 1977) (summary judgment for defendant reversed because question of fact existed regarding whether plaintiff actually knew, understood, and appreciated the danger of a possible movement of the railroad car under which he was working); *see also* Campbell v. Nordo Prods., 629 F.2d 1258, 1262 (7th Cir. 1980) (assumption of risk is measured by subjective standard of whether "*plaintiff's decedent* knowingly, voluntarily, and deliberately encountered" the risk) (emphasis in original).

44. *See, e.g.,* Thomas v. Kaiser Agricultural Chems., 81 Ill. 2d 206, 214, 407 N.E.2d 32, 35-36 (1980) (plaintiff who was injured while attempting to fill a fertilizer machine with liquid nitrogen did not voluntarily face a known danger, even though he had read instruction decal on machine regarding its use and failed to check air pressure gauge as instructed).

45. 28 Ill. App. 3d 307, 328 N.E.2d 649 (5th Dist. 1975).

46. *Id.* at 310, 328 N.E.2d at 650-51.

47. *Id.*

48. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 427, 261 N.E.2d 305, 312 (1970). For a discussion of *Williams,* see *supra* notes 32-41 and accompanying text.

49. *Collins,* 28 Ill. App. 3d at 311-14, 328 N.E.2d at 652-54 (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965)).

50. *Id.*

lot under emergency conditions was neither voluntary nor unreasonable. Therefore, recovery was not barred by the assumption of risk defense.[51]

The *Collins* court addressed a factual situation that did not support a finding of assumption of risk. Additional facts may have produced the same result. For example, it might never have occurred to the plaintiff to inspect the newly installed assembly for defects before driving the truck. Alternatively, the plaintiff deliberately might have chosen not to inspect the brakes. Finally, the plaintiff may have inspected the assembly, but failed to discover the defect in the brakes. None of these possibilities should bar plaintiff's recovery because the failure to discover the defect in the product, or "to guard against the possibility of . . . [the] existence" of such a defect does not amount to assumption of risk under the Restatement.[52]

Alternatively, if the plaintiff inspected the assembly and discovered the defect in the brakes, yet proceeded to drive his truck back to the seller's station for further repair, it is probable that a jury would conclude that the plaintiff's subjective "knowledge, understanding and appreciation of the danger"[53] rendered his actions unreasonable and voluntary. Pursuant to both the Restatement test and the *Williams* decision, the plaintiff in this situation would have assumed the risk of injury, thereby barring recovery. These examples further illustrate the inherent unfairness in the subjective standards of the assumption of risk doctrine. The fine distinctions made by the fact finder in a post-*Williams* strict products liability case regarding the plaintiff's conduct can form the difference between a recovery, based upon contributory negligence, and no recovery, based upon a finding of assumption of risk.[54] To exacerbate the injustice, The Restatement standard appears to place an unarticulated obligation on the plaintiff to inspect for product defects in order to "guard against the possibility of . . . [their] existence."[55] Furthermore, if the plaintiff does inspect for defects, it is to his advantage not to discover them. When the plaintiff merely fails to recognize a defect upon inspection, he is guilty, at most, of "contributory negligence" and his action should not be barred. In contrast, when the plaintiff inspects and finds the defect, his action could be barred by assumption of risk if the finder of fact determines that he had the requisite knowledge of the defect and, nonetheless, unreasonably proceeded to encounter the danger. Ironically, the Restatement seems to reward plaintiffs who do not inspect the products they use.

These fine distinctions,[56] promulgated by the concept of assumption of

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51. *Id.* at 313, 328 N.E.2d at 653.

52. RESTATEMENT (SECOND) OF TORTS, § 402A comment n (1965).

53. Williams v. Brown Mfg. Co., 45 Ill. 2d at 430, 261 N.E.2d at 312.

54. *See* Twerski, *Old Wine in a New Flask, supra* note 19, at 22-24. "[T]he maneuvering room for assumption of risk . . . [is] very narrow, [and] one must ask if it is worthwhile to permit the existence of [this] independent defense." *Id.* at 24-25.

55. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

56. Such distinctions may properly be labeled hair splitting because assumption of risk and contributory negligence are so difficult to distinguish. *See* Provence v. Doolin, 91 Ill. App. 3d 271, 280-81, 414 N.E.2d 786, 793-94 (5th Dist. 1980) ("In such cases it is clear that the

risk as characterized in the Restatement and *Williams,* are fundamentally unfair to the plaintiff. Recently, however, enlightened courts have begun to reject these distinctions. California has led this movement,[57] and Illinois does not appear to be far behind.[58]

ASSUMPTION OF RISK IN STRICT TORT LIABILITY ACTIONS IN CALIFORNIA FOLLOWING THE ADOPTION OF COMPARATIVE NEGLIGENCE

California has long been a forerunner in products liability law.[59] Hence, the Illinois courts occasionally have looked to California law for guidance in products liability actions.[60] In *Li v. Yellow Cab Co.,*[61] California adopted comparative negligence. In *Daly v. General Motors Corp.,*[62] the California judiciary abolished assumption of risk as an affirmative defense in strict liability cases. A review of these cases illustrates how the defense of assumption of risk progressed in strict tort liability actions brought in Illinois courts.

In *Li,* the plaintiff driver was making a left turn when he was struck by a taxicab approaching from the opposite direction.[63] The lower court found that the cab driver's actions were unsafe because he had been proceeding at a speed of thirty miles per hour through the intersection on a yellow light.[64] The court also found that the plaintiff's left turn "was made at a time when a vehicle was approaching in the opposite direction so close as to constitute an immediate hazard."[65] The lower court ruled that the plain-

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defenses of assumption of risk and contributory negligence overlap, and are as intersecting circles, with a considerable area in common, where neither excludes the possibility of the other.") (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 441 (4th ed. 1971)). In Russo v. The Range, Inc., 76 Ill. App. 3d 236, 238, 395 N.E.2d 10, 13 (1st Dist. 1979), the court stated:

> [The theory of assumption of risk] . . . borders and at times intersects with the theory of contributory negligence. It occurs when . . . the plaintiff, aware of a danger created by the defendant's negligence, proceeds voluntarily to encounter it. Illinois recognizes this type of assumption of risk as an affirmative defense in products liability cases.

(citing Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970)). The *Russo* court's citation to *Williams,* a strict liability case, to define assumption of risk in a negligence context, exemplifies the general confusion experienced by the courts in distinguishing contributory negligence and assumption of risk in negligence and strict liability actions.

57. *See infra* notes 61-83 and accompanying text.

58. *See infra* notes 86-99 and accompanying text.

59. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (predecessor of Restatement § 402A elements of strict liability).

60. *See* Suvada v. White Motor Co., 32 Ill. 2d 612, 621, 210 N.E.2d 182, 187 (1965) (citing Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962)); *see also* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425-26, 261 N.E.2d 305, 309 (1970) (court acknowledged that in nonnegligence actions, simple contributory negligence is insufficient to preclude recovery) (citing Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962)).

61. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

62. 20 Cal. 3d 725, 735 P.2d 1162, 144 Cal. Rptr. 380 (1978).

63. 13 Cal. 3d 804, 809, 532 P.2d 1226, 1229, 119 Cal. Rptr. 858, 861 (1975).

64. *Id.* at 809, 532 P.2d at 1229, 119 Cal. Rptr. at 861.

65. *Id.* at 809, 532 P.2d at 1229-30, 119 Cal. Rptr. at 861-63.

tiff's negligence had contributed to the collision and that recovery was barred "by reason of such contributory negligence."[66]

The California Supreme Court reversed this ruling, replacing the "all or nothing" rule of contributory negligence with the doctrine of comparative negligence.[67] The purpose of the comparative system was to assign responsibility for damages in proportion to each party's negligence.[68] Consequently, the plaintiff's contributory negligence did not bar recovery, but rather, diminished his damages in proportion to his negligence.[69] The *Li* court reached its conclusion by relying on "logic, practical experience, and fundamental justice."[70]

The *Li* court evaluated the traditional assumption of risk defense within the new comparative negligence structure and stated:

> As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent. . . . [A] system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.
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> . . . [Assumption of risk is] to be subsumed under the general process of assessing liability in proportion to fault. . . .[71]

Going one step further, in *Daly v. General Motors Corp.*,[72] the California Supreme Court defined the role of assumption of risk in the strict liability context. The plaintiffs' decedent in *Daly* was driving his automobile on a freeway at fifty to seventy miles per hour when the car struck a metal divider fence. The driver's door was thrown open upon impact, and, as the automobile spun around, the driver was forcibly ejected and killed.[73] The plaintiffs brought a strict liability action, contending that a defectively designed car latch was the proximate cause of the death.[74] The defendant, General Motors, the manufacturer of the decedent's car, claimed that the decedent's alleged intoxication, and his failure to use the seatbelt-shoulder harness system and the door lock, contributed to his death.[75]

The Supreme Court of California did not discuss whether the decedent had read the automobile manual, which encouraged use of the safety equipment; whether the decedent knew, or should have known, that his failure

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66. *Id.* at 809, 532 P.2d at 1230, 119 Cal. Rptr. at 862.

67. *Id.* at 828-29, 532 P.2d at 1243-44, 119 Cal. Rptr. at 875.

68. *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

69. *Id.*

70. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864. The *Alvis* court based its adoption of comparative negligence on the same policy considerations as did the *Li* court. *See* Alvis v. Ribar, 85 Ill. 2d 1, 16-18, 25-27, 421 N.E.2d 886, 892-93, 897-98 (1981).

71. 13 Cal. 3d at 824-26, 532 P.2d at 1240-42, 119 Cal. Rptr. at 872-74.

72. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

73. *Id.* at 730, 575 P.2d at 1164, 144 Cal. Rptr. at 382.

74. *Id.*

75. *Id.* at 731, 575 P.2d at 1165, 144 Cal. Rptr. at 383.

to use the safety equipment could contribute to serious injury; or whether his intoxication was evidence that he "voluntarily and unreasonably proceed[ed] to encounter a known danger."[76] In short, the court did not evaluate the decedent's conduct in the context of the Restatement's definition of contributory negligence (failure to discover the product defect), or the Restatement's classic definition of assumption of risk (voluntary and unreasonable decision to risk a known hazard) in strict liability.[77] Rather, the Supreme Court of California characterized the decedent's conduct as no more than a "variant of contributory negligence which was merged into the assessment of liability in proportion to fault."[78] The court proclaimed that the "defense of 'assumption of risk,' to the extent that it is a form of contributory negligence, is abolished" in strict liability actions.[79]

The *Daly* court also noted that precise distinctions between the terms comparative negligence, contributory negligence, and assumption of risk were "*less important than the attainment of a just and equitable result.*"[80] To the court, the absence of such distinctions in the area of strict liability suggested that a "*judicial posture that is flexible* rather than doctrinaire" should be adopted.[81] The *Daly* court's conciliation of these concepts[82] evidences the court's focus on ensuring substantial justice for the parties. Because the promotion of substantial justice is also of paramount importance to the Illinois Supreme Court,[83] it is likely that Illinois will follow *Li* and *Daly*.

CURRENT CASE LAW IN ILLINOIS

The Illinois Supreme Court moved to a system of comparative apportionment of damages in two recent cases, *Skinner v. Reed-Prentice Division Packaging Machinery Co.*[84] and *Alvis v. Ribar.*[85] These decisions, one involving a strict products liability claim, and the other a negligence action,

76. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

77. *Daly*, 20 Cal. 3d at 736-38, 575 P.2d at 1167-69, 144 Cal. Rptr. at 386-87 (citing Li v. Yellow Cab, 13 Cal. 3d at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73).

78. *Id.* at 735, 575 P.2d at 1167, 144 Cal. Rptr. at 385 (citing *Li*, 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872).

79. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

80. *Id.* at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386 (emphasis added).

81. *Id.* (emphasis added).

82. In *Daly*, the California court broadly combined comparative negligence and strict products liability concepts. The court refused "to resolve the important issue before [it] by the simple expedient of matching linguistic labels which have evolved either for convenience or by custom." *Id.* The court stated that "the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence . . . can be blended or accommodated," particularly where the development of these principles has involved "much conceptual overlapping and interweaving in order to attain substantial justice." *Id.* at 734-35, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

83. *See* Alvis v. Ribar, 85 Ill. 2d 1, 16-18, 25-27, 421 N.E.2d 886, 892-93, 898 (1981); *see also* Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 11-13, 374 N.E.2d 437, 441-43 (1978) (no-contribution rule abandoned because of its unjust results).

84. 70 Ill. 2d 1, 374 N.E.2d 437 (1978).

85. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

provide the groundwork for modifying the assumption of risk affirmative defense in strict tort liability cases.

In *Skinner,* the plaintiff brought a strict products liability action against the manufacturer of an injection molding machine that malfunctioned and caused her injuries.[86] The manufacturer, in turn, filed a third-party complaint against the plaintiff's employer,[87] alleging that the employer had misused the product and assumed the risk of injury. The court held that the third-party complaint "state[d] a cause of action for contribution based on the relative degree to which the defective product and the employer's misuse of the product or its assumption of the risk contributed to cause plaintiff's injuries."[88] Accordingly, the court examined the equities of the case and apportioned the plaintiff's damages between the manufacturer and the employer based upon the extent to which the condition of the product and the employer's conduct proximately caused the plaintiff's injuries.[89]

The *Skinner* court stated in dicta that the plaintiff's misuse of the product or her assumption of the risk would bar her recovery.[90] While this indicates the court's previous intent to retain the assumption of risk defense as a bar in strict liability actions, the *Skinner* court's application of assumption of risk against a third-party defendant represented a significant departure from the traditional role portrayed by the affirmative defense in a strict products liability action. This novel usage of the doctrine may indicate that the Illinois Supreme Court, pursuant to equitable principles, will apply assumption of risk in other nontraditional ways in the future.[91]

While the *Skinner* decision may be construed as the first indication that the doctrine is changing in Illinois, *Alvis v. Ribar*[92] may be the second manifestation of this transformation. Although *Alvis* was a negligence action, the rationale applied by the *Alvis* court is equally applicable to the assumption of risk doctrine in strict products liability cases. In *Alvis,* the plaintiff was injured while riding as a passenger in the defendant's car, which skidd-

86. 70 Ill. 2d at 4-5, 374 N.E.2d at 438.

87. *Id.*

88. *Id.* at 16, 374 N.E.2d at 443; *see also* Robinson v. International Harvester Co., 70 Ill. 2d 47, 49-50, 374 N.E.2d 458, 459 (1978) (manufacturer may bring cause of action for contribution against employer where pleadings alleged product misuse and/or assumption of risk); Stevens v. Silver Mfg. Co., 70 Ill. 2d 41, 374 N.E.2d 455, 457 (1978) (manufacturer may sue for partial indemnity against employer where pleadings alleged product misuse or assumption of risk).

89. 70 Ill. 2d at 14, 374 N.E.2d at 442.

90. *Id.* at 15, 374 N.E.2d at 443 (citing Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970)).

91. As one commentator recognized, "since the court must be using the terms in an innovative sense, it can be speculated that the court is suggesting a doctrine of assumption of *part* of the risk or implying that assumption of risk and misuse are partial defenses which reduce rather than bar liability." Note, *Skinner v. Reed-Prentice: The Application of Contribution to Strict Product Liability,* 12 J. MAR. J. PRAC. & PROC. 165, 180 (1978) (emphasis in original). For arguments that the holding in *Skinner* was a maverick use of assumption of risk, see Justice Underwood's and Justice Dooley's separate dissenting opinions in *Skinner,* 70 Ill. 2d at 20-22, 374 N.E.2d at 445-46 (Underwood, J., dissenting), and *id.* at 22-41, 374 N.E.2d at 446-55 (Dooley, J., dissenting).

92. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

ed out of control and struck a stop sign.[93] The Illinois Supreme Court extended its earlier decision in *Williams,* which had established that contributory negligence would not bar recovery in a strict products liability action,[94] by abolishing the long-standing rule that contributory negligence bars recovery in a negligence action. The *Alvis* court adopted the doctrine of comparative negligence, whereby the plaintiff's negligence merely reduces her damages in proportion to her responsibility for the injury.[95] The *Alvis* court's rationale for adopting comparative negligence was to correct the fundamental injustice perpetuated by contributory negligence.[96] The court reasoned that it was unfair to require a slightly negligent plaintiff to bear the entire cost of her injury. Therefore, the court opined that attributing financial responsibility in accordance with each party's respective negligence would promote fairness and justice for both the plaintiff and the defendant.[97] Having cited the California *Li* case in support of this judicial emphasis on substantial justice,[98] the *Alvis* court also noted that the *Skinner* decision resolved "[t]he collateral issue of contribution among joint tort-feasors" by applying comparative negligence principles.[99]

By allowing contribution among joint tortfeasors, the Illinois court in *Skinner* initiated a movement toward equitable apportionment of damages. The *Alvis* decision constituted the next logical step by permitting a comparison of the plaintiff's and the defendant's fault in negligence actions in the interests of justice. This concern for fairness may foster modifications of the assumption of risk defense in Illinois.

Assumption of Risk Should No Longer Bar Recovery in Strict Liability Actions in Illinois

Several ideas support the conclusion that the Illinois courts soon will consider assumption of risk a diminishing factor in recovery, rather than a com-

93. *Id.* at 4, 421 N.E.2d at 887. Neither the Illinois Supreme Court nor the appellate court specified the factual basis for a finding of contributory negligence. *See* 85 Ill. 2d 1, 421 N.E.2d 886 (1981); 78 Ill. App. 3d 1117, 398 N.E.2d 124 (1979).

94. *See supra* text accompanying note 39.

95. 85 Ill. 2d at 25-28, 421 N.E.2d at 896-98. The *Alvis* court adopted comparative negligence in its pure form. *Id.* at 27-28, 421 N.E.2d at 898. This means that a plaintiff's action is not barred regardless of how great his negligence may be. The modified form of comparative negligence bars a plaintiff's recovery when the negligence attributable to him reaches a certain percentage of the total amount of injury producing negligence. The minimum percentage is 50% in some states, 51% in others. *Id.*

96. *Id.* at 15-21, 421 N.E.2d at 892-95.

97. *Id.* at 16-17, 421 N.E.2d at 893.

98. *Id.* at 17-18, 21, 27, 421 N.E.2d at 893, 895, 898.

99. The *Alvis* court stated: "[In *Skinner*] this court found that 'governing equitable principles require that ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which [each defendant's] conduct proximately caused them.'" *Id.* at 28, 421 N.E.2d at 898 (quoting *Skinner,* 70 Ill. 2d at 14, 374 N.E.2d at 442). Interestingly, the *Alvis* court's quotation of this *Skinner* excerpt is inaccurate. Rather than compare each defendant's responsibility, the *Skinner* court compared the defective product with the employer's negligence. This anomaly does not, however, detract from *Alvis*'s necessary reference to *Skinner.*

plete bar to recovery in strict tort liability actions. This transformation appears likely because the Illinois judiciary has demonstrated its concern for fundamental fairness and equitable allocation of liability in both strict products liability (*Skinner*) and negligence (*Alvis*) actions. The *Skinner* court's rationale for abolishing the no-contribution rule was based upon the unfairness of the indemnity doctrine.[100] The *Alvis* court's abolition of the contributory negligence bar to recovery in negligence cases constituted an equitable correction of the defense's "all or nothing" rule.[101] With this current judicial sentiment, it is probable that, when presented with the proper case, the Illinois courts will recast the assumption of risk defense in strict products liability actions based upon principles of justice.

The first argument which supports modification of the assumption of risk defense is that the defense is unfair to the plaintiff because the fact finder's subjective inquiry into whether the plaintiff's choice was knowing, voluntary, and unreasonable is an imprecise venture.[102] The *Alvis* court abolished contributory negligence as an affirmative defense in negligence cases because it was sufficiently disturbed by the *objective* "reasonable man" test of contributory negligence.[103] After *Alvis,* the question arises whether a plaintiff still should be completely denied recovery in a strict liability action when the jury is instructed to use the incognizable *subjective* standards of the assumption of risk defense. The logical solution to this problem is to allow the plaintiff partial recovery on his cause of action, even if his conduct was unreasonable, and then simply to evaluate that conduct in relation to the defendant's responsibility for the defective product.

Altering the assumption of risk defense in Illinois would not be unprecedented because California has already forged a path in the *Li* and *Daly*

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100. Skinner v. Reed-Prentice Div. Packaging Mach. Co., 70 Ill. 2d 1, 10-13, 374 N.E.2d 437, 442 (1978); *see supra* note 89 and accompanying text.

101. *Alvis,* 85 Ill. 2d at 16-18, 25-27, 421 N.E.2d at 892-93, 897-98; *see also Li,* 13 Cal. 3d at 810 n.3, 532 P.2d at 1230 n.3, 119 Cal. Rptr. at 862 n.3 ("[Contributory negligence] places upon one party the entire burden of a loss for which two are . . . responsible.") (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67, at 433 (4th ed. 1971)).

102. The argument that assumption of risk should be modified because it is unfair to the plaintiff may be summarized as follows:

> The values of individual responsibility and voluntary choice, however, provide weak support for the classical defense of assumption of risk in the modern context of strict products liability. First, the voluntary-choice justification does not distinguish the plaintiff's conduct from that of the defendant, since the manufacturer too has made a conscious choice to sell products with certain calculable risks and inevitable accident costs. If both the plaintiff's and the defendant's conscious choices are responsible for the resulting injury and if the relative quality of the knowledge that each possesses to inform his choice is not relevant to the application of the assumption of risk defense, it is hard to see why the plaintiff's choice to assume the risk is weightier in fairness terms than the defendant's choice to impose it.

Note, *Assumption of Risk, supra* note 19, at 888-89 (1982); *see also* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts,* 60 MARQ. L. REV. 297, 347-48 (1977) (where a plaintiff voluntarily and unreasonably encounters a known risk, recovery should be reduced); *supra* note 22; *supra* notes 37-56 and accompanying text.

103. Alvis v. Ribar, 85 Ill. 2d 1, 16-21, 421 N.E.2d 886, 892-95 (1981).

cases.[104] In *Alvis,* the Illinois court relied on the California court's reasoning when it adopted comparative negligence.[105] Based upon the Illinois Supreme Court's recognition of the California experience in the development of products liability law, it is likely that the court again will refer to the reasoning of that jurisdiction to support a change in the assumption of risk defense.

As some commentators have noted,[106] adopting a modified version of the assumption of risk defense would not equate that defense with contributory negligence. A crucial distinction between the two concepts is that assumption of risk involves a tacit agreement by the plaintiff to accept the risk of harm through his conduct.[107] In contrast, this tacit agreement to accept the risk of harm is lacking in contributory negligence. Otherwise, the conceptual differences between the two are irrelevant. Assumption of risk and contributory negligence are simply two gradations of plaintiff conduct that are different in degree, but not in kind. In a comparative causation system, the plaintiff's misconduct should be viewed on a continuum between slight negligence and overt consent to injury and should be evaluated in relation to the defendant's responsibility. If a plaintiff's mere negligence, which is perhaps a mild state of plaintiff misconduct, only limits recovery, then consistency demands that a plaintiff's assumption of risk, while admittedly a more serious degree of plaintiff misconduct, should be a diminishing factor in recovery, rather than a total bar. Illinois seems to be moving toward a system of comparative causation, as evidenced by *Skinner* and *Alvis.* Consequently, the next step in a logical progression is to treat assumption of risk in the same manner that contributory negligence has already been treated: neither should bar a cause of action in strict products liability.[108]

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104. *See supra* notes 61-83 and accompanying text.

105. *See supra* note 98.

106. For an illuminating discussion on the illusory concept of conscious decision making that lies at the heart of the voluntariness requirement of the Restatement (Second) of Torts, see V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974) [hereinafter cited as SCHWARTZ]. Schwartz observes that

> [p]robably the strongest argument for retention of assumption of risk as a complete defense is based on the generic difference between assumption of the risk and contributory negligence. In theory, it is based not so much on plaintiff's *fault* as on his agreement by his conduct to take the risk of the very consequences that befell him. Viewed from that perspective, it is a close cousin of the consent defense in intentional torts. Since consent would remain an absolute defense to intentional torts under a comparative negligence system, a fortiori, assumption of risk should keep its place as a bar to negligence.
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> The best answer to this contention is that assumption of the risk differs from consent in one important respect. By consent to an intentional tort, plaintiff manifests his agreement to the actual invasion of his interest in person or property. On the other hand, when plaintiff assumes a risk, he volunteers to be subject to a *possible* injury. This is a giant step away from consent when viewed from the perspective of whether plaintiff has actually agreed to hold defendant harmless for the risk.

Id. § 9.5, at 173-74 (emphasis in original).

107. *Id.*

108. It also should be noted that apportioning damages based on the respective responsi-

CONCLUSION

The defense of assumption of risk in strict tort liability actions, as created by the Restatement and adopted by Illinois in the *Williams* decision, espouses a vague and subjective inquiry into whether the plaintiff's decision to use a product was voluntary and reasonable. This dubious test often results in the denial of a plaintiff's recovery. Illinois courts should eliminate the unfairness of the assumption of risk defense in strict tort liability actions based upon the same rationales employed by the *Skinner* and *Alvis* decisions, which rejected the injustice of the no-contribution and contributory negligence rules. The Illinois judiciary's concern with fairness, guided in part by California's development of the assumption of risk defense, dictates that comparative fault principles should apply to all plaintiff conduct, regardless of gradation. Therefore, the Illinois defense of assumption of risk in strict tort liability actions should no longer completely bar recovery, but rather, should diminish that recovery in proportion to the plaintiff's responsibility for causing the injury. Fairness demands nothing less.

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bility of the parties presents no greater difficulty to a jury than it already may have in determining the plaintiff's subjective state of mind, as required by the assumption of risk defense. *See Alvis*, 85 Ill. 2d at 20, 421 N.E.2d at 893. The experienced trial attorney and judge should recognize that juries, in the sanctuary of the locked deliberation room, often decide questions of liability and damages based on their own notions of fairness. SCHWARTZ, *supra* note 106, at 208-09.